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# The Paris Company et al v. Industrial Commission of Utah et al : Brief of Defendant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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THE PARIS COMPANY and STATE INSURANCE FUND,

Plaintiffs,

-vs-

THE INDUSTRIAL COMMISSION OF UTAH and J. BRENT CHRISTENSON,

Defendants.

Supreme Court No. 15882

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NEBO SCHOOL DISTRICT and STATE INSURANCE FUND,

Plaintiffs,

-vs-

JOAN CRAGUN and THE INDUSTRIAL COMMISSION OF UTAH,

Defendants.

Supreme Court No. 15881

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PATRICIA H. WHITE,

Plaintiff,

-vs-

INDUSTRIAL COMMISSION OF UTAH, ST. BENEDICT'S HOSPITAL and PACIFIC EMPLOYER'S INSURANCE COMPANY,

Defendants.

Supreme Court No. 15796

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BRIEF OF DEFENDANT ON APPEAL

INDUSTRIAL COMMISSION

of Utah

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## NATURE OF THE CASES

These cases involve the interpretation of Section 35-1-69 U.C.A. 1953, as it pertains to apportionment of medical expenses and compensation between the Second Injury Fund and the insurance carriers for the employers. These three cases request apportionment of temporary total benefits, and medical expenses incurred before and after a determination has been made for permanent partial disability.

## DISPOSITION BY THE INDUSTRIAL COMMISSION

The Commission ruled that under the circumstances of these particular cases there should be no apportionment of temporary total benefits and medical expenses. Petitions for Writ of Review in each case bring these matters before this Court.

## RELIEF SOUGHT ON APPEAL

Defendant on appeal, Industrial Commission of Utah, seeks an affirmance of the rulings of the Industrial Commission.

## STATEMENT OF FACTS

RE: JOAN CRAGUN

Nebo School District and State Insurance Fund.

Industrial Commission adopts facts as related by Plaintiff's on Appeal.

RE: PARIS CO. AND STATE INSURANCE FUND

Defendant Industrial Commission adopts facts as related in Brief of Defendant on Appeal J. Brent Christenson.

RE: PATRICIA H. WHITE

Defendant Industrial Commission adopts facts as

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related by Plaintiff's on Appeal with the addition of a finding of the medical panel that the patient was "to some extent, better off by having the condition taken care of and stabilized."

POINT I.

RELEVANCY OF ORTEGA DECISION

As the three cases combined in this appeal all rely upon Intermountain Health Care Inc. v. Ortega, 562 P.2 617 (Utah 1977), it is necessary to discuss the relevancy of that case. These three cases are only the tip of the iceberg of the dozens of cases already before the commission, before this court or simply biding time to see what action this case and others before the court will produce. As all use Ortega as their legal authority it is important we first briefly review the Ortega decision.

Plaintiffs' on appeal argue that Ortega is the precedent for apportionment of temporary total compensation, for apportionment of medical expenses during temporary total disability and for the definition of "substantially greater." These three areas will be discussed separately under Points of Argument.

It is important, however, to first evaluate what occurred in Ortega before logical conclusions can be made on any of the claims of the plaintiffs.

Of great significance is the fact that except for a misinterpretation of a finding of the Industrial Commission by this court none of the three issues would have been before the court in that case:

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> The major difficulty in this case stems from the fact that the Commission found that the claimant had a pre-existing psychological condition relating to pain in her back, which combined with this accident resulted in permanent partial disability of 30 percent, 10 percent attributable to the pre-existing condition and the other 20 percent to this accident. The claimant's testimony and the medical report provide support for that finding; and, since the latter also indicates that continued psychiatric treatment may lead to further significant improvement in the claimant's condition, the Commission reserved its final determination of the plaintiff's liability for total disability benefits until the treatment is completed. (emphasis added). Int. H. Care Inc. v. Ortega, supra.

The Commission made no such finding. The medical panel and individual doctors and attorneys for the parties talked of such percentages but the record in that case clearly shows that the Findings and Order of the Commission reserved, pending the outcome of the psychiatric treatment and further psychiatric evaluation, the issues pertaining to permanent partial disability compensation.

This Court correctly acknowledged in the above quoted paragraph of Ortega that the Commission reserved its final determination until the treatment is completed but then ignored that fact by apportioning compensation and medical expenses contrary to Section 35-1-69, U.C.A. 1953. That section reads in part:

> If any employee who has previously incurred a permanent incapacity by accidental injury, disease or congenital causes, sustains an industrial injury. . .that results in permanent incapacity which is substantially greater than he would have incurred if he had

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> not had the pre-existing incapacity, compensation and medical care. . .shall be awarded on the basis of the combined injuries, . . . (emphasis added).

The errors made in Ortega were timely called to the attention of the court in a Petition for Rehearing and for Clarification but denial for rehearing was made without the Petition being reviewed.

Another statement of the problems raised by Ortega in our second injury fund law is made by the Industrial Commission in its Denial of Motion for Review (R-107) Christenson record.

Not all the problems raised by Ortega are before us in this combined case. One particularly disturbing ruling was made in awarding Ortega compensation for a pre-existing disability that surely was not shown to be permanent. There cannot be an apportionment value placed on a non-permanent, illusory and non-definable possible ailment under the Utah statute or any other second injury statute in the United States.

Regardless of whether certain issues were before the court in Ortega the rulings of that case were a complete departure from established workmen's compensation law and procedure and from past decisions of this court. See Evans v. Industrial Commission, 28 Ut 2 324, 502 P.2 118. Ortega will also, as evidenced by this combined case, and numerous other cases in the wings and some already before this court, cause a flood of litigation that will haunt the law in this field for years to come unless corrected.

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POINT II.

TEMPORARY TOTAL DISABILITY IS NOT APPORTIONABLE

The general rule, and from our research the only rule, is that "the full responsibility rule applies to temporary total disability even in a state which permits apportionment of permanent partial disability." Larsons Workmen's Compensation Law, Vol. 2 Sec. 59.10 (264). The "full responsibility" rule imposes liability for the entire resulting disability upon the employer.

Section 35-1-69, supra, speaks only of permanent incapacity and there is no mention of temporary total incapacity or disability. Section 69 comes into play only when there has been a determination of permanent partial (or permanent total) disability by the commission.

The reason for the general application of this principal of full responsibility for temporary disability in all states is not hard to see. If temporary total is a subject of apportionment every case involving pre-existing condition which has heretofore been paid by the carrier without controversy will be thrust into litigation. This will cost a great deal more to administer and the real looser will likely be the employee. It would be necessary to have a medical panel in each such case. and it should be noted that the special fund pays the expenses of the panel. Medical payments would be held up. Doctors will refuse to treat the patient because of delays in payment and

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hospitals will refuse to admit for the same reason. In general, total chaos will result in an area that for many years has been an orderly system.

At the present time one percent of approximately 50,000 workmen's compensation cases per year are litigated. Under plaintiff's interpertation of what Ortega does that figure would multiply drastically.

This court in Woldberg v. Industrial Commission, 74 Ut. 309 states that the workmen's compensation act provides a plain, speedy and adequate method of review. If temporary total disability payments were apportionable the procedure would not be plain, speedy or adequate.

Temporary total compensation has never been the subject of apportionment in this state before Ortega. Another interesting aspect of this matter is that although the plaintiffs' in this case all cite Ortega as the reason for claiming apportionment of temporary total payments the court did not award temporary total compensation and specifically stated that the amount of this (temporary total compensation) award is not challanged by the plaintiff.

> Based on a medical panel's report the commission found that the claimant was temporarily totally disabled from November 12, 1970 to February 11, 1971, and again from November 8, 1973 to November 11, 1973. The commission awarded the claimant $559.54 in benefits for those two periods. The amount of this award is not challenged by the plaintiff. (emphasis added).

Later in the opinion the court addressed itself to payment

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of temporary total disability compensation and specifically approved the action of the commission in ordering that temporary total compensation be paid by the carrier.

> The plaintiff's assertion that "the claimant is not entitled to temporary total disability during medical treatment is patently unsound. Such benefits are intended to compensate a workman during the period of healing and until he is able to return to work, usually when released for that purpose by his doctor. . . . We observed that compensation is not necessarily awardable simply because it is desirable or advisable for her to continue psychiatric therapy, but it is properly awardable only during actual inability to work which is found to have been caused by and is properly attributable to the industrial accident. Under the circumstances here shown the Commission was justified in ordering that temporary total disability compensation continue during the time she is disabled and until she is released for work by her doctor. (emphasis added). Ortega, supra.

POINT III.

MEDICAL EXPENSES ARE NOT APPORTIONABLE DURING TEMPORARY TOTAL DISABILITY.

The apportionment of medical expenses during the period of temporary total disability raises all of the problems associated with the apportionment of temporary total compensation. There is a dearth of court decisions in this area. Undoubtedly the reason is that in Utah as well as other jurisdictions both the law and the impracticality of administration have dictated that medical expenses are not apportionable during temporary total disability.

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Before Ortega, medical expense was paid entirely by the carrier or employer, a practice that has prevailed for all of the years of workmen's compensation law in this state. If medical expense is subject to apportionment then the carriers will deny more claims and throw more claims into litigation. Such a practice will be more costly to the State and it will certainly delay the payment of compensation and medical expenses.

35-1-69 supra, provides for medical expenses to be apportioned after a determination has been made of permanent incapacity. That section is triggered only when permanent incapacity is determined by the commission and after a finding by a medical panel.

It should also be noted that under 35-1-80 U.C.A. 1953, the Industrial Commission has the statutory authority to award medical expenses, in ordinary cases, which may in the judgment of the commission be just.

POINT IV.

"SUBSTANTIALLY GREATER" UNDER 35-1-69 U.C.A. MEANS SOMETHING MORE THAN A "DEFINITE AND MEASURABLE" PORTION OF THE CAUSATION OF THE DISABILITY.

The legislative amendment to section 69 in 1963 would be a useless jesture if some meaning were not attached to "substantially" being added to the word "greater."

In 1963 Section 35-1-69 was amended. It previously read:

> If any employee who has previously incurred permanent partial disability incurs a subsequent permanent partial disability such that the compensation payable for the disability resulting from the

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> combined injuries is greater than the compensation which, except for the pre-existing disability would have been payable for the latter injury, the employee shall receive compensation on the basis of the combined injuries, but the liability of his employer shall be for the latter injury only and the remainder shall be paid out of the special fund. . . . (emphasis added).

It is readily seen that for the compensation to be greater the pre-existing disability must be greater. So when the word substantially is added to the word greater the legislature certainly intended something significantly more than just greater.

Plaintiffs, in the language of *Ortega*, argue that "substantially greater" means only that which is definite and measurable. One percent is definite and measurable but certainly it is not substantially greater as contemplated under section 69. Five percent is the least amount of percentage used by the commission and Utah doctors in evaluating disability in workmen's compensation cases. Can we say that five percent, the smallest figure used to show disability, is a figure which is "substantially greater?"

If such a definition were to be used it is difficult to visualize any industrial accident case in which the carrier would not endeavor to show a pre-existing incapacity. And if the criteria be that it be definite and measurable there would be few employees who would not qualify. For example it could, and would, be argued that age is a definite and measurable portion of causation of disability in every case of a disabled older worker who comes before the commission. And what person, regardless of age,

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does not have a "pre-existing incapacity" of at least five percent or ten percent or more?

Webster's New International Dictionary, Unabridged second edition, in defining one of the important definitions of the word "substantial" is: considerable in amount, value, or the like; large; as a substantial gain: important, essential, material.

The following cases used that definition in defining substantial: In re Teed's Estate, 247 P.2d 54 at 58, a California case; Levenson v. U.S., 157 F. Supp. 244 at 250, an Alabama case; Safe Deposit & Trust Co. v. Magruder, 34 F. Supp. 199 at 202 a Maryland case; and Carter v. Vecchione, 133 A.2d 297 at 300, a Pennsylvania case. As "substantially greater" is used in section 69 we can find no relevance to it being simply definite and measurable.

The concept of second injury fund law is to encourage the hiring of those employees with a permanent pre-existing incapacity when otherwise they might not be employed because of the potential liability to the employer. But there was a "deductable" clause attached so that all pre-existing conditions would not be apportionable. And that deductable clause includes "substantially greater", prior, and permanent. These conditions must be met before apportionment is to be made. Ortega seemed to ignore all these conditions.

Few phrases have been so reiterated by this court concerning cases involving the Industrial Commission than that the rulings of the commission should be upheld if it were possible

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to arrive at such a conclusion from the facts of the case. Can we now say that the commission has been in error for over 40 years in their interpertation of the word greater and for 15 years in their interpretation of substantially greater? See Evans v. Industrial Commission, supra.

FURTHER ARGUMENTS ON THE INDIVIDUAL CASES

The arguments made thus far have application to all three of the combined cases. There are factual differences in each of the cases which should be noted.

PATRICIA H. WHITE vs. INDUSTRIAL COMMISSION

This employee began working for Saint Benedict's Hospital in September of 1966. The record indicates some previous back problems before working for the hospital. However, since working at St. Benedict's she was hospitalized in 1967 for back problems; surgery was performed in 1971 for decompression of L-4 and L-5; hospitalized in 1974 for back problems and in addition had numerous occassions to consult doctors concerning back problems during this period of 1966 to the time of the industrial accident in 1976. (R-50). She incurred an industrial accident on May 6, 1976 while working at the hospital. She underwent surgery in December 1976, and a lamenectomy decompression of L-4 and L-5 with wide bilateral root decompression and excision of herniated L-4 disc was performed.

During this entire period from 1966 to the accident at the hospital in May 6, 1976, Mrs. White was working for the same employer.

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The medical panel met in August of 1977 and concluded the claimant had a twenty percent impairment from all causes; five percent from the industrial accident and fifteen percent from pre-existing conditions. The panel also stated:

> The degenerated disc has now been removed which was giving trouble and could have given serious trouble recurrently prior to the industrial injury, and to some extent the patient is better off by having this condition taken care of and stabilized. (emphasis added). (R-238)

The commission, because of these facts, stated that section 31-1-69, supra, did not apply. That section requires the claimant be worse off after the industrial accident than before the accident. The "results" of the pre-existing incapacity plus the industrial injury cannot be the same as or less than that percentage of disability taking either separately.

Larson's Workmen's Compensation Law, 59.32 (10-315) states as the general rule:

> When the final disability is exclusively the result of the pre-existing condition the second injury fund is not liable, since there is no tie-in with a compensable injury.

There is ample evidence in the record to support the ruling of the commission that Mrs. White is as well off today or perhaps even better off in terms of disability than before the industrial accident of 1976. The surgery performed after the industrial accident helped stabilize long standing difficulties.

The pleadings do not indicate White seeks temporary total compensation. However, all of the previous decisions relative

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to apportionment of medicial expenses and "substantially greater" are pertinent to the *White* case.

PARIS COMPANY AND STATE INSURANCE FUND vs. INDUSTRIAL COMMISSION AND J. BRENT CHRISTENSON.

Brent Christenson was injured in December, 1972, while lifting boxes at the Paris Company. He made no claim as a result of that injury. He was again injured in August of 1974 while again lifting boxes for the Paris Company. In January of 1976 a spinal fusion was performed "as a direct result of the episode of August 1974, as well as repeated insults to his back both before and after the alleged accident." Panel Report (R-79).

Christensen testified that since the surgical operation he has no problems at the present time with his back. (R-33).

The medical panel felt that there was a pre-existing incapacity attributable to conditions before the August, 1974 accident of five percent. They said the percentage of physical impairment attributed to the industrial injury of August, 1974, is five percent.

It is noted that five percent increments is the least percentage disability that is awarded by our medical panels. Five percent is surely not "substantially greater" than if there had been no pre-existing incapacity.

Another factor that would preclude involvement of 35-1-69 supra, in this case is the Statute of Limitations in section 35-1-99 U.C.A. 1953 which reads in part:

> If no claim for compensation is filed with the industrial commission within three years from the date of the accident or the date of the

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> last payment of compensation, the right to compensation shall be wholly barred.

The commission in commenting upon this section said:

> Without belaboring other considerations, the commission is of the opinion that the combined injury fund is not responsible for a claim that is otherwise barred by the statute of limitations.

The Paris Company cannot now cause the fund to be responsible for apportionment of compensation which claimant is barred from pursuing because of the statute of limitations.

The commission had substantial evidence in the record to sustain their ruling that 35-1-69 supra, does not apply in this case.

NEBO SCHOOL DISTRICT AND STATE INSURANCE FUND vs. JOAN CRAGUN AND THE INDUSTRIAL COMMISSION

As the carriers in this case are endeavoring to protect themselves against possible future medicals and possible future temporary total compensation that may become due after exhausting the amount of the third party settlement it is questionable if these carriers are rightly before this court. See Motion to have Second Injury Fund Pay Proportionate Share of Future Medicals and Future Temporary Total Benefits. (R-374).

If, however, the carriers have an arguable position in the possible future liability of the second injury found, then:

1. Future medical expenses not associated with temporary total disability is apportionable under section 35-1-69 as earlier stated.

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2. Temporary total, whether past or future, is not apportionable, as previously argued.

3. Ten percent pre-existing incapacity is not substantially greater as previously argued.

CONCLUSION

Plaintiffs on Appeal in these three cases base their entire argument on Intermountain Health Care Inc. v. Ortega, supra. This argument must fall for the following reasons:

1. Ortega rulings were based on false presumption that the commission had made a finding of permanent partial disability when in fact the commission had specifically reserved that issue because of treatment being received and which showed promise of successfully curing or reducing her disability.

2. Apportionment of temporary total disability was not a ruling of Ortega and was specifically not apportioned in that case.

3. Section 35-1-69 allows apportionment of medical expenses only after a determination of permanent partial disability.

4. The records in each of the cases provide substantial evidence to support the commission's findings that section 35-1-69 is not applicable to allow the apportionment of temporary total disability compensation, past or future, nor to allow apportionment of medical expenses incurred before a determination of permanent partial disability.

The rulings of the Industrial Commission sould be affirmed.

DATED this 27th day of December, 1978.

Assistant Attorney General

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